RECENT CASES.

ADVERSE POSSESSION—PURCHASE OF OUTSTANDING TITLE—One claiming title to lands by adverse possession under color of title entered under a deed from a stranger to the title, but before the period for perfecting his title had run, purchased a one-half undivided interest in the lands from one who claimed to be a tenant in common. *Held:* The purchase of the outstanding title did not break the continuity and adverse nature of the holding under the first title. Paper Lumber Co. v. Richmond Cedar Works, 84 S. E. Rep. 523 (N. C. 1915).

The practically universal result of the decisions is that the purchase of an outstanding title by an adverse holder does not necessarily interrupt the continuity of the possession nor prevent it from being longer adverse. Whether it does or does not affect the adverse possession, depends entirely upon the circumstances of each case. Generally, if the possession began under a claim of title in fee, the purchase of another title is not regarded as an interruption of the former possession. Elder v. McCaskey, 70 Fed. Rep. 529 (1895); Ripley v. Miller, 130 N. W. Rep. 345 (Mich. 1911). Nor is an offer by an adverse holder to purchase the claim of another sufficient to break the continuity of the running of limitation. Montgomery Lumber Co. v. Quimby, 128 Pac. Rep. 402 (Cal. 1913). The principle of the rule is that the person in possession of property under a claim of complete ownership has the right to fortify his title, quiet his possession, and protect himself from litigation by the buying of any real or pretended titles, without thereby recognizing the validity of such titles, or holding possession in subordination to them. Cannon v. Stockmon, 36 Cal. 535 (1869); Mather v. Walsh, 107 Mo. 121 (1891). There is, however, at least one case which lays down the broad general rule that the purchase of an outstanding title by an adverse holder must be regarded as an abandonment of whatever possessory title he had and as a holding under the new deed. Croan v. Joyce, 3 Bush. 454 (Ky. 1867); but see Bryant v. Prewitt, 117 S. W. Rep. 343 (Ky. 1909).

There have also been numerous cases in which the continuity of possession has been interrupted by the purchase of an outstanding claim, because exceptional circumstances showed that the adverse possessor intended to abandon his prior possession and claim under his newly acquired title. Jackson v. Sears, 10 Johns. 435 (N. Y. 1813); Liggett v. Morgan, 98 Mo. 39 (1888).

AGENCY—LIABILITY OF PRINCIPAL FOR OVER-OFFICIOUS SERVANT—A young man was employed by defendant solely for the purpose of marking goods. He, in excess of his authority, followed customers from the store, charged them with larceny and caused their arrest. *Held:* In the absence of ratification, the proprietor was not liable for his employee's acts. Rigby v. Herzfeld-Phillipson Co., 151 N. W. Rep. 260 (Wis. 1915).

Undoubtedly the principal may be liable for the act of his agent in an action of false imprisonment, but the act of the agent becomes that of the principal only when expressly authorized, Pinkerton v. Martin, 82 Ill. App. 589 (1889); or when his authority to act may fairly be inferred from the nature and scope of the employment. The authority may be implied when the arrest is made by the agent in the absence of the principal for the protection of property that is in danger, and in some cases it has been inferred when the arrest was to recover the property back, or where the crime was at the time being perpetrated. Markley v. Snow, 56 Atl. Rep. 999 (Pa. 1904); Field v. Kane, 99 Ill. App. 1 (1901). Thus the proprietor was held liable for the acts of his watchman and floor-walker in arresting a customer suspected of stealing. Efroymson v. Smith, 63 N. E. Rep. 328 (Ind. 1902). Likewise

defendant railroad was not liable for the action of a porter who had temporary charge of its yard in arresting a teamster whom he suspected of stealing. Edwards v. London & N. W. Ry. Co., L. R. 5 C. P. 445 (1870). But see *contra,* Bernheimer Bros. v. Becker, 102 Md. 250 (1905). There is a distinction between acts done for the purpose of protecting property by preventing a felony or of recovering it back, and acts done for the purpose of punishing the offender for what has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person whom he supposes to have done something in reference to the property. Allen v. London & S. W. Ry. Co., L. R. 6 Q. B. 65 (1870).

BILLS AND NOTES—USURY—A note void in its inception for usury continues void forever, even in the hands of a holder in due course. The Negotiable Instruments Law, §57, has not altered the established law on this point. Sabine v. Paine *et al.,* 151 N. Y. Supp. 735 (1915). The defense of usury (under the above section of the Negotiable Instruments Law) is only an equity, and cannot be urged against a holder in due course. Ernst Oser & Co. v. Behrend, 151 N. Y. Supp. 873 (1915).

These two contemporaneous, but conflicting, decisions of the New York Supreme Court indicate the nebulous state of the law upon this point. It is generally held that illegality by statute, except where the instrument is expressly declared to be void, is merely an equity. Sondheimer v. Gilbert, 18 N. E. Rep. 687 (Ind. 1888); Bluthenthal v. Frederick, 175 Ala. 398 (1912). It was clearly established in New York, before the Statute, that usury was an absolute defense. Claflin v. Boorum, 122 N. Y. 385 (1890). Since the Negotiable Instruments Law, the New York courts, in common with many others, have expressed doubts as to whether the act has changed the former rule. Klar v. Kostink, 119 N. Y. Supp. 683 (1909); Crusins v. Siegman, 142 N. Y. Supp. 348 (1913). On the one hand, it is argued that since the act provides that a holder in due course takes free from defect of title of prior parties, the old law is repealed by necessary implication. Emanuel v. Misicki, 149 N. Y. Supp. 905 (1914). Other courts, on the other hand, maintain that if the legislature intended to make so drastic a change, it would have done so by express enactment. Lawson v. First Nat. Bk., 102 S. W. Rep. 324 (Ky. 1907).

The Court of Appeals of New York has not as yet declared the present law on this subject. It has held, however, in Schlesinger v. Gilhooly, 189 N. Y. 1 (1907), and Schlesinger v. Lehmaier, 191 N. Y. 69 (1908), that where a bank is a holder in due course the defense of usury is unavailable as against it. These decisions were based upon a liberal construction of the State Banking Law on the subject of usury in connection with §57 of the Negotiable Instruments Law. It would seem that if the provision of the Negotiable Instruments Law is at all applicable to banks, it should also apply to individual holders in due course.

BILLS AND NOTES—HOLDER IN DUE COURSE—BURDEN OF PROOF—The indorsee of a note which had been negotiated to him by the payee in breach of an agreement with the maker brought suit against the maker. *Held:* The holder cannot rely merely upon the presumption that he is a holder in due course, but has the burden of proving it. Holdsworth v. Blyth & Fargo Co., 146 Pac. Rep. 603 (Wyo. 1915).

In an action on a negotiable instrument plaintiff is presumed, in the first instance, to be a *bona fide* holder. Strickland v. Henry, 66 App. Div. 23 (N. Y. 1901). It is further presumed that he took before maturity, Walters v. Palmer, 110 Ga. 776 (1900), and without notice of defenses, Pickens v. Post, 99 Fed. Rep. 659 (1900). The presumption holds even though the defendant sets up the defense of want of consideration as between maker and payee. Holden v. Phoenix Co., 47 N. E. Rep. 241 (Mass. 1897); Crosby

v. Ritchey, 76 N. W. Rep. 895 (Neb. 1898). But, when the consideration for a note is shown to have been illegal, the burden is cast upon the indorsee, suing thereon to show that he is a holder in due course. Le Tourneux v. Gilliss, 82 Pac. Rep. 27 (Cal. 1905); Sullivan v. Langley, 120 Mass. 437 (1876); Orr v. Cotta Co., 92 N. Y. Supp. 521 (1904). Fraud by payee in procuring the note casts upon the indorsee the burden of proving payment for value. Trust Co. v. Bank, 83 S. E. Rep. 474 (N. C. 1915); Ruper v. Gravey, 5 Pa. Super. Ct. 316 (1897). The burden is upon the plaintiff to prove that he is a *bona fide* purchaser where the defendant proves that the note was put in circulation by fraud, Bank v. Avant, 66 So. Rep. 509 (Ala. 1915); Regester v. Reed, 183 Mass. 226 (1904); Bank v. Furman, 4 Pa. Super. Ct. 415 (1897), where it was held that an affidavit of defense setting out facts which would make a case of fraudulent circulation of the note, put upon the plaintiff the burden of proving himself a *bona fide* holder. Putting a note in circulation contrary to an agreement with the maker is sufficient fraud to cause the above doctrine to be applied. Ward v. Bank, 170 S. W. Rep. 845 (Tex. 1915).

CRIMINAL LAW—ASSAULT—EXCESSIVE SPEED OF AUTOMOBILE—The crime of assault and battery may be committed by driving an automobile on a public highway at a rate of speed that endangers the safety of other persons and actually results in such an injury. The intent to injure, which is essential, may be inferred from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional. State v. Schutte, 93 Atl. Rep. 112 (N. J. 1915).

In accordance with the principal case, it is held that intent by an automobile driver to commit an assault and battery by driving his car against another may be inferred from circumstances legitimately permitting it, as by intentional acts directly causing the injury done under reckless disregard of the safety of others or the commission of an unlawful act naturally leading to such injury. Luther v. State, 98 N. E. Rep. 640 (Ind. 1912). Mere violation of an ordinance, however, does not in itself supply the intent to another act (assault and battery) which requires a criminal intent to be proved. Commonwealth v. Adams, 114 Mass. 323 (1873). Nor will mere lack of ordinary care supply the intent. Luther v. State, *supra*. A verdict of guilty of assault in operating an automobile will be sustained where the evidence shows that the machine was run with reckless speed on the wrong side of the highway, and in such a manner that it zigzagged from side to side. Commonwealth v. Bergdoll, 55 Pa. Super. Ct. 186 (1913). See 63 UNIV. OF PENNA. LAW REV. 320 (Feb. 1915).

CRIMINAL LAW—PROSTITUTION—The defendant induced a girl to enter a house of ill fame for the purpose of having personal sexual intercourse with her. *Held:* That a conviction could not be sustained under the Act of June 7, 1911, P. L. 698, which provides that anyone who shall procure or entice a female person to become an inmate of a house of prostitution, or to enter "for the purpose of prostitution" any place where prostitution is practiced, shall be guilty of pandering. "Prostitution means common, indiscriminate sexual intercourse in distinction from sexual intercourse confined exclusively to one individual." Commonwealth v. Lavery, 247 Pa. 139 (1915).

In accordance with the principal case, it is quite generally held that statutes prescribing the punishment for enticing a female person to leave her place of abode "for the purpose of prostitution" do not apply to the case of a man enticing such woman for the sole purpose of illicit sexual intercourse with him. Comm. v. Cook, 53 Mass. 93 (1846); Iowa v. Ruhl, 8 Ia. 447 (1859); State v. Gibson, 111 Mo. 92 (1892). The word "prostitution" does not mean sexual intercourse with some particular man, or with one man only, but it means to offer freely and openly to an indiscriminate, common intercourse with men. People v. Demoussett, 77 Cal. 611 (1887); Haygood

v. State, 98 Ala. 61 (1892). The Act of Congress known as the White Slave Act prohibits the interstate transportation of a woman or girl "for the purpose of prostitution or debauchery or any other immoral purpose". Act of June 25, 1910, c. 395, 36 Stat. 825, U. S. Comp. St. Supp. 1911, p. 1343. Under this act, it has been held sufficient to sustain a conviction that the accused has caused a woman to be transported, in interstate commerce, for the sole purpose of having sexual intercourse with her. Johnson v. U. S., 215 Fed. Rep. 679 (1914); U. S. v. Flaspoller, 205 Fed. Rep. 1006 (1913). It would seem that the difference in the language of the two statutes should account for the contrariety in the decisions under them, and that the words "for the purpose of prostitution, debauchery or any other immoral purposes" should be broad enough to include private sexual intercourse whereas the words "for the purpose of prostitution" should not. See 63 U. OF P. L. R. 326.

CRIMINAL PROCEDURE—VARIANCE—An indictment for grand larceny alleged that the accused had obtained by fraudulent representation "the sum of $5512.50 lawful current and genuine money of the United States". The proof showed that no money had actually been paid, but that he had received a draft which was later converted into two drafts of $4000 and $1000, and a deposit credit in a bank for the balance. *Held:* There was no fatal variance. State v. Cary, 151 N. W. Rep. 186 (Minn. 1915).

At common law, the utmost strictness of proof was exacted in criminal cases, even to the very letter of the averment in the indictment. Rex v. Lee, 1 Leach Cr. L. 416 (Eng. 1786). Today, however, a distinction is made between the material and an immaterial variance in the proof from the indictment; no variance is regarded as material unless it is of such a substantial character as to mislead the accused in preparing his defence, or unless it places him in a second jeopardy for the same offense. Bennett v. U. S., 194 Fed. Rep. 630 (1912). As a general rule, any averment not necessary to describe or to constitute the offense, which therefore may be omitted without affecting the criminality of the charge and without detriment to the indictment, will be treated as surplusage and need not be proved. Commonwealth v. Phoenix Hotel Co., 157 Ky. 180 (1914).

Where an indictment for larceny charges the taking of money, the cases are not in accord as to what constitutes a variance. In Perry v. State, 42 Tex. Cr. Rep. 540 (1901), it was held that proof of larceny of national bank notes would not support an indictment alleging larceny of "lawful money of the United States". But see State v. Finnegean, 127 Ia. 286 (1905), *contra.* In State v. Daniel, 83 S. C. 309 (1909), it was declared that proof of larceny of a note or other obligation, given for money, will not support a conviction under an indictment charging the larceny of money. But under a similar indictment, where it was proved that the defendant had obtained a draft or a check which he subsequently cashed, the court decided that there was no material variance. People v. Geyer, 117 N. Y. Supp. 662 (1909); People v. Arnold, 127 Pac. Rep. 1060 (Cal. 1912). None of these cases go quite so far as the principal case. It is said, however, in the principal case, "There is no suggestion that defendant was misled or prejudiced. To hold a fatal variance under those circumstances is but another application of a technicality, protecting no right of the accused, but tending to obstruct the administration of justice".

DECEDENTS' ESTATES—EXECUTORS—STOCK—A financial panic reduced the value of stock left by the testator and six years thereafter the executors accepted in exchange therefor stock issued in pursuance of a consolidation plan which proved a failure. *Held:* In the absence of proof of negligence or bad faith an order surcharging the executors with the value of the stock at time of testator's death is error. Dauler's Estate, 247 Pa. 356 (1915).

It is well settled that an executor is required to use only reasonable diligence and good faith in performing the duties of his trust, King v. Morri-

son, 1 P. & W. 188 (Pa. 1829); Calhoun's Estate, 6 Watts, 185 (Pa. 1837); Skeer's Estate, 236 Pa. 404 (1912). The prudence and care ordinarily used in one's own business is the standard. Getz's Estate, 12 Phila. 143 (1878); Whitney v. Peddicord, 63 Ill. 249 (1872), but his acts must be judged according to the circumstances existing at the time. Hull's Estate, 8 Pa. Dist. Rep. 8 (1898). So as a general rule it is his duty to convert personal property into available funds as soon as reasonably possible. Pulliam v. Pulliam, 10 Fed. Rep. 53 (1881); *In re* Gray, 91 N. Y. 502 (1883), and in some states this must ordinarily be done within a year, Merkel's Estate, 131 Pa. 584 (1890). The proper method is by public auction, Burnap v. Dennis, 4 Ill. 478 (1842), though this is usually discretionary, Johnson v. Kay, 8 Humph. 142 (Tenn. 1847), except where required by statute, Weyer v. Bank, 57 Ind. 198 (1877). So where an executor acts in good faith in delaying a sale, he is not chargeable with loss occasioned thereby unless grossly negligent. Stewart's Appeal, 110 Pa. 410 (1885); Matter of Hasford, 27 App. Div. 427 (N. Y. 1898); Donnelly's Estate, 8 Pa. Dist. Rep. 182 (1899).

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—A husband, in failing circumstances, conveyed his stock to his wife in repayment of advances made to him by her out of her separate estate. *Held:* If the wife had knowledge of an intent upon the part of the husband to defraud his creditors, the conveyance would be set aside as fraudulent, even though the wife gave an adequate consideration. English v. Brown, 219 Fed. Rep. 248 (1914).

A conveyance may, under certain circumstances, be made by a husband to his wife when the husband is in failing circumstances, Jewell v. Knight, 123 U. S. 426 (1887), but the wife must have given valuable consideration, Clark v. Chamberlain, 95 Mass. 257 (1866), and the conveyance must have been received by her in good faith and from an honest purpose, Smith v. Goodrich, 87 S. W. Rep. 125 (Ark. 1905). Defrauded creditors of the husband may have the deed set aside if the wife knew of the husband's fraudulent intent, Goodrich v. Lumber Co., 150 S. W. Rep. 406 (Ark. 1912), or if she knew of facts which would charge her with knowledge of such intent, Jewell v. Kelley, 118 N. W. Rep. 987 (Mich. 1909). The mere fact that an action is pending against the husband when he conveyed to the wife, is not sufficient to show that she knew of his fraudulent intent, Graham v. Morgan, 35 So. Rep. 874 (Miss. 1904). The wife of an insolvent will be presumed to have knowledge of her husband's intent, Castro v. Illies, 22 Tex. 479 (1858); Leich v. Dee, 47 N. W. Rep. 881 (Iowa, 1891), the burden being on the wife to show that the transaction was fair, Gray v. Collins, 139 Ga. 776 (1913). *Contra:* Blackwell v. O'Neal, 152 Ky. 563 (1913). But it is not necessary that she make out a case so clear that there is no doubt that she was a *bona fide* purchaser, Tripner v. Abrahams, 47 Pa. 220 (1864).

INJUNCTION—WRONGFUL USE OF NAME AND PICTURE—A drug company placed the name and picture of the complainant on bottles containing a medicinal compound without his consent. *Held:* An injunction will be granted. Edison v. Continental Chemical Co., 220 Fed. Rep. 398 (1914).

In England, an injunction will not issue to prevent a druggist from selling a quack medicine under the false representations that it was prepared by the complainant, an eminent physician, Clark v. Freeman, 11 Beav. 112 (Eng. 1848). "In Clark's case an injunction might have been granted on the ground that complainant had property in his own name." Lord Cairns in Maxwell v. Hogg, 2 Ch. D. 307 (Eng. 1876).

The American cases on the subject are comparatively few in number and are in conflict. An injunction will not be granted to restrain the unauthorized publication of lithographic prints of a complainant, where the only allegation is that there is an invasion of the complainant's right of privacy. Robertson v. Box Co., 171 N. Y. 538 (1902); Atkinson v. Doherty, 121 Mich.

372 (1899). *Contra:* Pavesich v. Insurance Co., 122 Ga. 190 (1905). A public character cannot restrain the publication of his portrait. Corliss v. Walker, 64 Fed. Rep. 280 (1894); nor can a public institution restrain the unauthorized use of its name. Vassar College v. Biscuit Co., 197 Fed. Rep. 982 (1912). An injunction will be granted to restrain the unauthorized use of one's name by another as part of its corporate title, or in connection with its business, even though he is not a business competitor. Edison v. Mfg. Co., 73 N. J. E. 136 (1907). The principal case may be distinguished from those cases in which an injunction was refused on the ground that, as Edison's name would cause the public to believe that the drug was of some value, it would be a fraud on the public to allow the defendant to falsely represent that Mr. Edison was the maker of the drug. For further discussion and citations see 61 U. OF P. L. R. 129; 62 *Ibid.* 656.

LANDLORD AND TENANT—DEFECTIVE STEPS—LIABILITY FOR INJURY—A lease was made of one room in a house to which access was by a flight of steps, under the lessor's control, leading over an area. At the time of letting, one of the upright bars in the railing at the side was missing. Through this aperture the lessee's child, while playing on the steps, fell into the area and was injured. *Held:* The lessor was not liable, as the defect in the railing was apparent, and not in the nature of a concealed danger or trap. Dobson v. Horsley, [1915] 1 K. B. 634 (C. A.), following Lucy v. Bawden, [1914] 2 K. B. 318.

In both these cases Miller v. Hancock, [1893] 2 Q. B. 177 (C. A.), was carefully distinguished; there the plaintiff was injured by the breaking of a step apparently sound, and recovery was allowed against the lessor, Bowen, L. J., laying it down that "the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants, and also of those persons who would necessarily go up and down the stairs in the ordinary course of business with the tenants". That general principle is accepted in the American cases as well. Crane Elevator Co. v. Lippert, 63 Fed. Rep. 942 (1894); Looney v. McLean, 129 Mass. 33 (1880); Gillvon v. Reilly, 21 Vroom, 26 (N. J. 1887).

The distinction between injuries caused by defects patent and by those unseen is pointed out in Quinn v. Perham, 151 Mass. 162 (1890), where it was held that a tenant could not recover for injuries received from the bad condition of the passageway leading to her tenement, where she leased the tenement knowing the condition of the passage. This must be considered not a limitation of the landlord's obligation to keep a safe passageway, but an extension of his right to let defective premises if the defects are apparent at the time of letting. Wien v. Simpson, 2 Phila. 158 (1856).

NEW TRIAL—EXCESSIVE DAMAGES—Two plaintiffs, injured comparatively slightly in a collision, received verdicts of $500 and $1500 respectively, upon which judgment was rendered. The defendant appealed. *Held:* A new trial will be granted on the ground of excessive damages. Goodman v. Thomas; Goodman v. Roof, 174 S. W. Rep. 736 (Ky. 1915).

A new trial will be granted when the verdict is for so large an amount that no jury could reasonably have given it, or where the damages given are so excessive as to show passion, prejudice, partiality, or corruption on the part of the jury. Wirsing v. Smith, 222 Pa. 8 (1908); Felt v. Puget Co., 175 Fed. Rep. 477 (1909). In the very nature of things, however, where damages are given for personal injuries, the amount which will compensate the injured person cannot be measured by strict and definite rules, and must be left largely to the sound judgment of a jury and the trial judge. Ruck v. Brewery Co., 148 Wis. 222 (1912). Therefore the fact that the verdict is larger than the appellate court would have given, or that the court would be better pleased with a smaller verdict, is not necessarily ground for hold-

ing the verdict excessive. Lannon v. Chicago, 159 Ill. App. 595 (1911); Central R. Co. v. White, 175 Ala. 60 (1911). But where it clearly appears that a verdict is so large as to show that it is the result of prejudice or passion on the part of the jury, or a misconception of the law, the appellate courts will not hesitate to adjudge such a verdict excessive. Missouri R. Co. v. Lee, 119 S. W. Rep. 144 (Tex. 1909); Weiss v. R. Co., 119 Minn. 355 (1912). Where there have been several trials, a large discrepancy between the amount of the verdicts, or a substantial uniformity, is a circumstance to be considered in determining whether the verdict is excessive or otherwise. Central R. Co. v. White, *supra;* Ritter Co. v. Jordan, 138 Ky. 522 (1910). But the fact that several verdicts for the same general amount have been rendered is not necessarily controlling, if the verdict is clearly excessive. Partello v. R. Co., 240 Mo. 122 (1912).

In some cases where an excessive verdict has been rendered, the court will, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and on his remitting the excess will deny the motion for a new trial. Canfield v. R. Co., 142 Ia. 658 (1909); Francis v. Brock, 80 Kan. 100 (1909). But the general rule, though there is authority to the contrary, is that where the excessive verdict is due to passion or prejudice, the error cannot be cured by a *remittitur,* but the defendant is entitled to a new trial as a matter of right. Tunnel Co. v. Cooper, 50 Colo. 390 (1911); Belt R. Co. v. Charters, 123 Ill. App. 322 (1905). *Contra:* Kurpgeweit v. Kirby, 88 Neb. 72 (1910). The mere fact that a verdict in an action for unliquidated damages is very excessive does not necessarily show that it was the result of passion or prejudice, so as to deprive the court of the power, with the consent of the plaintiff, to correct the error by directing a *remittitur.* Kerling v. Van Dusen, 113 Minn. 501 (1911); Clifton v. R. Co., 232 Mo. 708 (1911).

New Trial—Misconduct of Counsel—Allusion to Insurance—In an action for the death of an employee in which the sole issue was the defendant's negligence, the plaintiff's counsel asked a juror upon his *voir dire* examination if he knew the defendant's counsel "who represent the Ocean Insurance Co. in this case". *Held:* The conduct of counsel for the plaintiff, although not ethical and very reprehensible, was not ground for reversal as the evidence was such that in all probability, the same verdict would have been returned by the jury in the absence of such misconduct. Parkdale Fuel Co. v. Tyler, 144 Pac. Rep. 1138 (Colo. 1914).

It is well settled that a jury, in a suit by an employee against his employer for personal injuries, will not be allowed to take into consideration the fact that the employer is insured against accidents to his employees. Sawyer v. Arnold Shoe Co., 90 Me. 369 (1897). Hence, the plaintiff's counsel will not be allowed to comment in his argument to the jury upon the fact that the defendant carries such insurance. Tremblay v. Harnden, 162 Mass. 383 (1894); Hollis v. U. S. Glass Co., 220 Pa. 19 (1908). And if such remarks are made, a judgment for the plaintiff will be set aside notwithstanding an instruction by the trial judge that the remarks should not be considered for any purpose. Coe v. Van Why, 33 Colo. 315 (1905). But see *contra,* where instruction to disregard the remarks is given, Anderson v. Duckworth, 162 Mass. 251 (1894). However, it has been held that the attorney for the plaintiff may in his examination of jurors on their *voir dire* ask them if they are in any way connected with an accident insurance company or have any interest therein, provided always that this is done in good faith without any intent to call the attention of the jury to the fact of the insurance unnecessarily or for the purpose of prejudicing the defendant's rights. Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97 (1906). Such questions are for the purpose of eliciting information from, and not imparting it to the jury. Brusseau v. Lower Buck Co., 110 N. W. Rep. 577 (Ia. 1907); Iverson v.

McDonald, 36 Wash. 73 (1904). In accord with the principal case, where it appears from the evidence that the defendant was not prejudiced by the reference to the insurance, it is not cause for reversal. Tanner v. Harper, 32 Colo. 156 (1904).

NEW TRIAL—SEPARATION OF ISSUES—Order XXXIX, Rule 7, of the English Rules of the Supreme Court, is: "A new trial may be ordered on any question without interfering with the finding or decision upon any other question." In an action for breach of promise of marriage, after verdict and judgment against him, the defendant discovered evidence tending to prove the plaintiff was married to someone else, and he applied for a new trial. A new trial was granted, upon the one question: whether the plaintiff was previously married or not, Buckley, L. J. (now Lord Wrenbury), saying "the defendant ought not to have a new trial on the question whether or not there was a promise to marry or as to the amount of damages". Robinson v. Smith, [1915] 1 K. B. 711.

This rule is frequently applied even in cases of this sort, where only one claim is made in the action, although it was originally meant as a complement to the increased facilities under the Judicature Acts for joinder of causes of action. In Marsh v. Isaacs, 45 L. J., C. P., 505 (1876), the plaintiff brought one action in respect of four separate claims against the same defendant; the jury found for the plaintiff upon two claims, for the defendant upon a third, and disagreed as to the fourth. Lindley, J., entered judgment upon the first three claims and discharged the jury as to the fourth. A general new trial was moved for, and it was held (under Order XXXIX, Rule 4, of 1875, corresponding to the above) that judgment was properly entered upon the first three issues, but that the parties might have a new trial upon the issue as to which the jury disagreed.

There are not many decisions reported under the rule, as its meaning is perfectly clear. In two cases the court refused to apply it, for cause, and granted retrial of the whole action. Purnell v. Great Western, *etc.*, 1 Q. B. 636 (1876), and Sandford v. Porter and Wane, [1912] 2 Irish R. 551.

The same rule of procedure is observed in American code states generally, though apparently not in New York. Colwell Lead Co. v. Construction Co., 156 App. Div. 824 (1913). In Massachusetts the Supreme Judicial Court early developed a similar practice without legislation on the subject. Winn v. Columbian Insurance Co., 29 Mass. 278 (12 Pick., 1831); Robbins v. Townsend, 37 Mass. 345 (20 Pick. 1838); Hubbell v. Bissell, 84 Mass. 196 (2 Allen, 1861).

PLEADING—MISSPELLING—In Yeater v. Jennings Oil Co., 84 S. E. Rep. 904 (W. Va. 1915), it was contended, without success, that the declaration was demurrable because the word "gauge" was spelled "guage". We are carried back to the middle ages when "faux latine" was a serious, sometimes fatal error. See "mumdare" for "mundare", 2 Hen. 4, 8 (1401); "Johanni" for "Johannem", 2 Hen. 4, 8 (1401); "hac breve" for "hoc breve", 9 Hen. 7, 16 (1494), and other cases in Brookes Abridgement, 333. Such niceties may delight the pleader in criminal procedure, but on the civil side, taking into consideration the limitations of the modern typist, one cannot but feel relieved that the West Virginia case went as it did.

PROCEDURE—PARTIES—ALIEN ENEMY—Two women both claimed to be the wife of Prince Victor of Thurn and Taxis. One sought to restrain the alleged libels of the other. It was contended that the plaintiff, being an Hungarian, was an alien enemy and consequently not entitled to sue in the English courts during the continuance of the war. *Held:* Having complied with the requirements of the Aliens Restriction Act of 1914, she came under the protection of the British government and had the right to sue. Princess of Thurn and Taxis, 112 L. T. Rep. 114 (Eng. 1914).

It is well established that during any war, foreign or civil, no action can be maintained by, or in favor of, an alien enemy residing in the enemy's territory. Russell v. Skipwith, 6 Binney, 241 (Pa. 1814); Haymond v. Camden, 22 W. Va. 180 (1883). This rule is grounded upon the theory that it would be impolitic to permit the fruits of an action at law to go to a hostile country and thus furnish resources to the enemy. The test as to the alien enemy's right to sue seems to be not whether the alien was a citizen in the enemy's country at the opening of the war, but whether, if he prove successful in the action, the probable effect will be to place the amount recovered within the enemy's reach. Zacharie v. Godfrey, 50 Ill. 186 (1869). However, when war occurred after judgment had been obtained by an alien and while a writ of error was pending, the judgment was affirmed. Owens v. Hannay, 13 U. S. Rep. 180 (1815). If the action be upon a contract expressly sanctioned by the government, it may be maintained, though the reason for the rule is as applicable in this case as in any other. The William Penn, 1 Peters, 106 (U. S. C. C. 1815). The right to sue is only suspended during the war, Louisville & N. R. Co. v. Buckner, 8 Bush. 277 (Ky. 1871); Bell v. Chapman, 10 Johns. 183 (N. Y. 1813); and the statute of limitations is prevented from running. Hopkirk v. Bell, 3 Cranch, 454 (U. S. 1806).

In accord with the decision of the principal case, it is well settled that an alien enemy residing in the country under a license express or implied may sue. Hall's International Law, page 388; Otteridge v. Thompson, 2 Cranch, 108 (U. S. C. C. 1814); Janson v. Dreifontein Consolidated Mines, 87 L. T. Rep. 372 (Eng. 1902). "A lawful residence implies protection and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity." Chancellor Kent in Clark v. Morey, 10 Johns. 69 (N. Y. 1813).

PROCEDURE—WRIT OF PROHIBITION—ISSUANCE—Upon complaint a magistrate issued an attachment without first requiring an attachment bond to be executed and filed as required by law. A motion to have the attachment discharged on that account was overruled by the magistrate, whereupon Supreme Court was asked for a writ of prohibition to prevent the magistrate from proceeding further in the case. *Held:* There is a plain, speedy and adequate remedy at law by appeal; hence the writ will not issue. Pendley v. Allen, 145 Pac. Rep. 1157 (Okl. 1915).

This decision is in accord with the general rule on the subject. The writ of prohibition is an extraordinary judicial writ issuing to a court from another court having supervision and control of its proceedings to prevent it from proceeding further in a matter pending before such lower court. 19 Am. & Eng. Enc. 263, 264. It will never lie where a court having jurisdiction of the parties makes an erroneous application of the law remediable by appeal. Pioneer Telephone & Telegraph Co. v. City of Bartlesville, 27 Okl. 214 (1910). In cases where the court below is acting beyond its jurisdiction it will be granted only where there is no other adequate remedy. Alexander v. Orollott, 199 U. S. 580 (1905). It is an appropriate remedy pending an appeal from an inferior to a superior court to prevent the former from exceeding its jurisdiction by attempting to execute the judgment appealed from, Supervisors v. Gorrell, 20 Grat. 484 (Va. 1871); to prevent an inferior court from interfering with or attempting to control the records and seal of a superior court by injunction, Thomas v. Meade, 36 Mo. 232 (1865); to prevent justices of the peace from proceeding without authority of law to abate a supposed nuisance, Zylstra v. Charleston, 1 Bay, 382 (S. Ca. 1794); to prevent a probate court exercising its jurisdiction over the estate of a deceased person when it cannot lawfully do so. U. S. v. Shanks, 15 Minn. 369 (1870). The writ of prohibition is however a purely prerogative writ, granted or withheld in the discretion of the court according to the circumstances of each particular case. State v. Whitaker, 114 N. Ca. 818 (1894). Prohibition will

not issue for ministerial but only for judicial acts. State v. Whitaker, *supra*. The unlawful act must also be the act of a judicial or quasi-judicial body. The writ does not lie against private individuals. Southern R. Co. v. Birmingham S. & N. R. Co., 131 Ala. 663 (1901); Moore v. Holt, 55 W. Va. 507 (1904).

PROPERTY—GIFTS—COMMUNITY PROPERTY OF HUSBAND AND WIFE—A husband gave certain stock certificates and promissory notes to his wife. Some were endorsed and assigned to her, others were not. They were all delivered over to her, and kept in her exclusive possession. *Held:* To overcome the presumption of community of property, the evidence must be clear and convincing that the stock and notes were the wife's own individual property. Possession of the assigned certificates was such evidence; possession of the unassigned certificates was not sufficient evidence to rebut the presumption. *In re* Slocum's Estate, 145 Pac. Rep. 204 (Wash. 1915).

In a few jurisdictions where the influence of the civil law is strongly felt, no rights of dower or courtesy exist, but all property acquired during the marriage relation, whether title thereto be taken in the name of the husband, of the wife, or in their joint names, is presumed to be community property. *In re* Boody, 113 Cal. 682 (1896); Fortier v. Barry, 111 La. 776 (1904); Lake v. Bender, 18 Nev. 364 (1883); Strong v. Eakin, 66 Pac. Rep. 539 (N. Mex. 1901); Clark v. Thayer, 98 Tex. 142 (1904). The burden rests with the parties claiming the separate character of the property. The presumption as to the community character of the property may be overthrown only by evidence of a clear, certain and convincing character. Fennell v. Drinkhouse, 131 Cal. 447. In cases of gifts *inter vivos* the possession of a note, bond or deed by an indorsee or assignee will be considered as raising a presumption of delivery. Castor v. Peterson, 2 Wash. 204 (1891). It is otherwise with the unassigned certificates and promissory notes, because a mere passage of the naked possession of notes to other than the payee or grantee and of certificates of stock to one to whom they have not been assigned or endorsed does not meet the requirements of a good delivery. Sharmer v. Johnson, 43 Neb. 509 (1895); Pennington v. Gittings, 2 Gill & J. 208 (Md. 1830); Matthews v. Hoagland, 48 N. J. Eq. 455 (1891).

SALES—RIGHTS OF BONA FIDE PURCHASERS—Lumber was sold and delivered to the buyer under an agreement that payment of purchase price should be made on delivery of goods. Subsequently, no payment being made, the buyer sold the lumber to a *bona fide* purchaser. *Held:* As between a *bona fide* purchaser and the original seller title is in the seller, unless he is guilty of *laches*. Orillia Lumber Co. v. Chicago, M. & P. S. Ry. Co., 146 Pac. Rep. 850 (Wash. 1915).

The majority view is that, when goods are sold upon condition that the price therefor shall be paid upon receipt of the goods, the title remains in the seller until the goods are paid for, McIver v. Frazier Co., 92 Pac. Rep. 170 (1904), and a subsequent purchaser from the buyer cannot obtain a title good as against the original seller, Lumber Co. v. Lewis, 121 Ala. 94 (1899); Steel Co. v. Ry. Co., 187 Mass. 500 (1905), unless the seller has been guilty of *laches*. Leatherbury v. Connor, 54 N. J. L. 172 (1892); Townsend v. Melvin, 63 Atl. Rep. 330 (Del. 1905). Not reclaiming goods within a reasonable time after default is such *laches* as will prevent vendor from setting up his title as against a *bona fide* purchaser from the buyer, Townsend v. Melvin, *supra;* but it is not necessary that the seller act immediately upon learning of the wrongful resale, Bennett v. Tam, 24 Mont. 457 (1900).

The minority view is that, although a delivery conditioned upon payment of the purchase price as a condition precedent to passing of title will operate to prevent title passing, as between immediate parties to the contract, until

the performance of the condition, Lee v. Galbraith, 5 La. Ann. 343 (1850), yet as to a *bona fide* purchaser from the buyer the original seller is without recourse. Ry. Co. v. Kerr, 49 Ill. 458 (1868); Lears v. Shroub, 24 Ind. App. 313 (1898). But this doctrine will not be enforced in favor of a subsequent purchaser where he has notice of the defect in the title of the original buyer, Garbutt v. Bank, 22 Wis. 384 (1867), or where the facts are such as to charge him with such notice. Bank v. McCrea, 106 Ill. 281 (1883).

SPECIFIC PERFORMANCE—CONTRACT NOT TO ALTER WILL—A contract was entered into whereby one party agreed that his will, which was already made with a provision in favor of the other party, should remain unchanged. The promisor subsequently devised the property to another person. *Held:* Equity will fasten a trust on the property in the hands of the devisee, and will decree that he make a conveyance to the promisee in accordance with the terms of the contract. White v. Winchester, 92 Atl. Rep. 1057 (Md. 1915).

A contract to make a certain disposition of property by last will, or not to revoke a will already made, cannot be specifically enforced by a decree compelling the promisor to make the will, in the one case, nor by an injunction preventing the revocation, in the other. Bourget v. Monroe, 58 Mich. 563 (1885); Turnispeed v. Sirrine, 57 S. C. 578 (1899). But the same result is reached by requiring those who acquire the legal title to convey the property in accordance with the terms of the promisor's agreement. Cassey v. Fitton, 2 Harg. Jur. Arg. 296 (Eng. 1679); Winne v. Winne, 166 N. Y. 263 (1901). Where the promisor, in breach of his contract to devise certain property, has conveyed it to another by act *inter vivos,* the promisee may obtain relief from the grantee, either after the promisee's death, Whiton v. Whiton, 179 Ill. 32 (1899); or before the promisor's death, in which case the grantee is directed to hold the land for the promisor during the remainder of his life, and at his death to convey to the promisee. Duvale v. Duvale, 56 N. J. Eq. 375 (1897). A valid contract to bequeath personalty is enforceable against the estate. Thompson v. Stevens, 71 Pa. 169 (1872); Harper's Estate, 196 Pa. 137 (1900).

There is a want of harmony among the decisions in regard to the enforcement of parol contracts to devise land, with reference to the scope and applicability of the Statute of Frauds. Dicken v. McKinley, 163 Ill. 318 (1896); Synge v. Synge, L. R. 1 Q. B. 466 (Eng. 1894). When the beneficiary of the contract to make a will is not a party to the agreement equity will not enforce the contract in favor of one from whom no consideration moved to either of the parties of the agreement. Wait v. Wilson, 86 App. Div. 485 (N. Y. 1903); Phalen v. U. S. Trust Co. of N. Y., 186 N. Y. 178 (1906).

SPECIFIC PERFORMANCE—REAL ESTATE—DOUBTFUL TITLE—A contract to purchase land was conditioned that the land should not be subject to restrictive covenants prohibiting apartment houses. It was later discovered that the land was encumbered by a restrictive covenant prohibiting the erection of buildings other than "dwelling houses." *Held:* "As dwelling houses" includes "apartment houses", specific performance is granted against the vendee. Reformed Protestant Dutch Church v. Madison Avenue Building Co., 108 N. E. Rep. 444 (N. Y. 1915).

The principal case seems to have gone very far in forcing a title upon a vendee, and can hardly be brought within the rules as laid down in the leading case of Pyrke v. Waddingham, 10 Hare, 1 (Eng. 1850). The general rule is that equity will not force a doubtful or non-marketable title upon a vendee. If the doubt as to the title arises upon a question of general law, specific performance should be decreed only when the general law upon that point is well settled. *In re* Thackwray, 40 Ch. Div. 34 (Eng. 1888); Matthews v. Lightner, 85 Minn. 333 (1902). If the doubt arises because of extrinsic cir-

cumstances and disputed facts, specific performance is to be refused. Barger v. Gery, 64 N. J. Eq. 263 (1902); Richmond v. Koenig, 43 Minn. 480 (1890). If the doubt arises upon the construction of a particular instrument, specific performance must be refused if the court is doubtful as to its construction, and should be refused if the doubt is so fair and reasonable that the property would be left in the purchaser's hands not marketable. The fact that the court's opinion is in favor of the title is not sufficient to decree specific performance. Pyrke v. Waddingham, *supra;* Chesneau v. Cummings, 142 Mass. 65 (1886). "To force a title on a purchaser, the opinion of the court in favor thereof must be so clear that it cannot be apprehended that another judge may form a different opinion." Rogers v. Waterhouse, 4 Drew. 329 (Eng. 1858).

While the principal case falls squarely within the third and last proposition laid down by Pyrke v. Waddingham, it is hard to reconcile the decision with the great majority of cases. The reasoning of the court is that, there being no dispute as to the facts, an interpretation of the restrictive covenant by the highest court of appeal would control the determination of subsequent suits involving the same point. Thus the rule that a vendee is not required to buy a lawsuit is not contradicted. Barnard v. Brown, 112 Mich. 452 (1897). Moreover, there are a few courts which hold, in accord with the principal case, that a court of appeal, in a case before it, will decide on the validity of a vendor's title, and irrespective of the decree below, will direct a conveyance or not accordingly. Kelso v. Lorillard, 85 N. Y. 177 (1881); Smith v. Estes, 72 Mo. 310 (1880).

STATUTE OF FRAUDS—PAROL AGREEMENT—LEASE OF REALTY—A parol agreement was made to execute a lease of certain real estate. The lease was to be for one year, renewable for three years more. *Held:* The lease was to be made in the future and, when executed would have extended over a longer period than one year. The parol agreement to execute such a lease is within the Statute of Frauds and unenforceable. Hanson v. Marion, 151 N. W. Rep. 195 (Minn. 1915).

By the Statute of Frauds, oral leases to take effect in the future or those which could not, when executed, be performed within one year, were invalid. The rule is that since the lease itself must be in writing, the agreement to enter into such a lease must also be in writing; otherwise the purpose of the statute would be wholly nullified and avoided in all cases. Cram v. Thompson, 87 Minn. 172 (1902); Hurley v. Woodsides, 21 Ky. Law Rep. 1073 (1899). The contrary doctrine is, however, held in some jurisdictions where the distinction between the case itself and the agreement to execute the same has been pointed out. Tillman v. Fuller, 13 Mich. 113 (1865). A lease for one year with the privilege of renewal for one or more years on a certain notice is for a greater term than one year. Donovan v. Schoenhofen Brewing Co., 92 Mo. App. 341 (1902).

SUNDAY—HOLDING COURT ON SUNDAY—In a murder trial, the closing arguments of counsel were concluded at 11.30 P. M. Saturday. A recess was taken until 11.00 A. M. Sunday when, in the presence of the attorney-general, the defendant and his counsel, the court charged the jury, who then retired. The verdict was returned into open court on Monday. *Held:* Charging the jury is a high judicial act and under the common law, no judicial act can be performed on Sunday. Moss v. State, 173 S. W. Rep. 859 (Tenn. 1915).

The universal rule at the early common law was that Sunday was a "dies non juridicus" and hence it was unlawful for a court to do any judicial act on Sunday. Coke, 2nd Inst. 264; see also Swann v. Broome, 3 Burr. 1595 (Eng. 1764), in which Lord Mansfield reviews the development of the rule from the Roman canons and constitutions, dating from 517 A. D., which made

Sunday a non-judicial day, until its adoption by the Saxon kings as part of the common law of England, and its application by the English courts. The awarding of any judicial process, the finding of an indictment, and the giving of judgment were considered judicial acts, and void if done on Sunday. Bedoe v. Alpe, Jones, 156 (Eng. 1628). But while judicial acts were unlawful, any ministerial act could be lawfully executed on Sunday. So an arrest, Mackalley's Case, 9 Co. Rep. 656 (1611).

In the absence of a statute, the modern cases have followed the old common law rule. There has been a great diversity of opinion as to what is a judicial act and what is a ministerial act. Charging the jury is generally considered a judicial act, and void if done on Sunday. Pulling v. People, 8 Barb. 384 (N. Y. 1850). But see *contra,* Gholsten v. Gholsten, 31 Ga. 625 (1860), where by inadvertence, the judge did not finish his charge until 12.10 A. M. Sunday; Johns v. Johnson, 61 Ind. 257 (1878), and State v. McGimsey, 80 N. C. 377 (1879), in which it was held that, when necessary for the speedy rendition of a verdict or when requested by the jury, instructions may lawfully be given on Sunday, after notice to or in the presence of the parties or their attorneys. However, receiving a verdict is merely a ministerial act and, as such, may be done on Sunday. State v. Keatine, 130 La. 434 (1912); Van Riper v. Van Riper, 4 N. J. L. 156 (1818), as a work of necessity; but see *contra,* Harper v. State, 43 Tex. 431 (1875). Rendering judgment is a judicial act and hence void when rendered on Sunday. Blood v. Bates, 31 Vt. 147 (1858); but see *contra,* Taylor v. Ervin, 119 N. C. 274 (1896), where a judgment rendered at once upon a verdict received on Sunday was held good. For a full discussion of the rules and citation of cases, see Ringgold's Law of Sunday, page 151, *et seq.*

TRADE-NAMES—INFRINGEMENTS—NAMES OF CELEBRATED MEN—A firm had used the registered trade-mark: "Listerene" for seventeen years for an antiseptic solution, when the defendant company adopted the name "Listerseptine" for a similar product. *Held:* The fact that Lord Lister, an eminent surgeon, twenty-nine years before had inaugurated the use of similar solutions resulting in the terms "lister" and "listerian" becoming familiar to the profession is immaterial and an injunction should be granted. Lambert Pharmacal Co. v. Kalish Co., 219 Fed. Rep. 323 (1915).

The name of one who has achieved fame and distinction may be adopted as a trade-name, provided it is not descriptive of the quality or character of the article. Petrolia Mfg. Co. v. Bell, etc., Soap Co., 97 Fed. Rep. 781 (1899); Hesseltine, Trade-Marks and Unfair Trade, page 15. Such names are considered arbitrary and fanciful. Barrows v. Knight, 6 R. I. 434 (1860). But the name must not be geographical. See 62 UNIV. OF PENNA. LAW REV. 666 (1914).

As to the territorial extent of protection, see Hanover Star Milling Co. v. Allen and Wheeler Co., 208 Fed. Rep. 513 (1913), and 62 UNIV. OF PENNA. LAW REV. 581 (1914). For the distinction between the relief for infringement and that for unfair competition, see note in 62 UNIV. OF PENNA. LAW REV. 458 (1914) and cases cited therein. See also the similar recent case of Lambert Pharmacal Co. v. Bolton Chemical Corporation, 219 Fed. Rep. 325 (1915).

TROVER AND CONVERSION—ELEMENTS—When a certain lot of land was sold, property, stock in trade, belonging to a third person which was kept there *gratis* by this landowner was advertised for sale, and by mistake a few minor articles were sold. *Held:* There was no conversion of the whole stock. Brandenburg v. Northwestern Jobbers' Credit Bureau, 151 N. W. Rep. 134 (Minn. 1915).

This decision is in accord with the general rule that to constitute a conversion of personal property there must be some definite exercise of the right

of complete ownership over it to the exclusion of the rights of the owner, or else some act done which destroys it or changes its character or in some way deprives the owner of it permanently or for an indefinite length of time. Harris v. Saunders, 2 Strobhart Eq. 370, Note (S. Ca. 1835). It has even been held that a paper sale of goods, not followed by any sale or by any exercise of ownership or dominion, is not a conversion. Taylor v. Horrall, 4 Blatchf. 317 (Ind. 1837). Conversion is often proved by a demand of possession by the owner and refusal by the person in possession to deliver. Demand and refusal are, however, merely evidence of conversion, and need not be proved when there is other evidence of conversion in fact. Krouschnable v. Knoblauch, 21 Minn. 56 (1874).

TORTS—INJURY TO TRESPASSING ANIMALS—A railroad company put poison on its unfenced right of way to destroy Johnson grass growing thereon. A statute forbade the growth of Johnson grass on railroad property, and another statute made railways that failed to fence their tracks liable for cattle killed. Cattle came upon the unenclosed right of way and ate the poison. *Held:* The railroad company is not liable for the death of the cattle. Fort Worth & R. G. Rwy. Co. v. Brown, 173 S. W. Rep. 943 (Tex. 1914).

In a number of jurisdictions, statutes make railroad companies answerable for all damages sustained in consequence of their neglect to fence. Missouri Pac. R. Co. v. Gill, 49 Kan. 441 (1892); Fremont, *etc.* R. Co. v. Pounder, 36 Neb. 247 (1893). But the fencing statutes of the great majority of States impose liability only for injuries done *to* animals, and not for any done *by* animals. Knight v. N. Y., Lake Erie, *etc.* R. Co., 99 N. Y. 25 (1885); Earl v. St. Louis, *etc.* Rwy. Co., 84 Ark. 507 (1907). In accord with the decision in the principal case, it has been frequently held that the company is liable only for cattle killed by its engines, cars or agents. Bear v. Chicago, *etc.* Rwy. Co., 141 Fed. Rep. 25 (1905); G. H. & S. A. Rwy. Co. v. Graves, 164 S. W. Rep. 413 (Tex. 1914). The company was held not to be liable where cattle came through a defective fence and were drowned in an unenclosed well situated on the company's right of way. Hughes v. Hannibal, *etc.* R. Co., 66 Mo. 325 (1877); and in many States there is no liability for injuries which are the result of fright, so long as the animal is not actually touched by any part of the train. Logan v. St. Louis, *etc.* Rwy. Co., 111 Mo. App. 674 (1905). *Contra:* Meeker v. Northern Pac. R. Co., 21 Ore. 513 (1892).

Whether an owner of unenclosed lands owes any duty of care with respect to trespassing animals, when by law they are permitted to run at large, is a question not settled by the authorities. The landowner was not liable when trespassing cattle drank poison left in a vat and died from its effects. Bernhorn v. Griswold, 27 Mont. 79 (1902). But he is liable for injuries to cattle by any artificial erection or excavation naturally calculated to produce injury. Hurd v. Lacy, 93 Ala. 427 (1890). In accord with the decision in the principal case, the modern trend of the authorities is to the effect that a person may put poison on his premises for the protection of his property, having due regard for the safety of human life, and he is not liable for damages to animals that eat the poison while trespassing. Cobb v. Cater, 59 S. C. 462 (1901); St. Louis & S. W. Rwy. Co. v. Bailey, 168 S. W. 406 (Tex. 1914).

TORTS—STATUTORY LIABILITY OF MUNICIPALITY FOR MOB VIOLENCE—A large crowd of persons confined in a city jail severely whipped and injured another prisoner "for breaking into their home". *Held:* The prisoners constituted a "mob" within the meaning of the statute making cities liable for damages resulting from mob violence. Blakeman v. City of Wichita, 144 Pac. Rep. 816 (Kan. 1914).

A municipal corporation is not liable at common law for the conse-

quences of its failure to protect persons and property from the violence of mobs and riotous assemblages. Western College v. Cleveland, 12 Ohio, 375 (1861); Hart v. Bridgeport, 13 Blatchf. 289 (U. S. C. C. 1876). However, statutes making communities liable for depredations committed by lawless persons have existed in England from an early period, Ratcliffe v. Eden, *et al.*, 2 Cowp. 485 (Eng. 1776); Hyde v. Cogan, 2 Dougl. 699 (Eng. 1781); and many American jurisdictions have also enacted similar statutes. Pennsylvania Co. v. Chicago, 81 Fed. Rep. 317 (1897); Champaign County v. Church, 62 Ohio, 318 (1900); Long v. City of Neenah, 107 N. W. Rep. 10 (Wis. 1906). The court in the principal case explains that the purpose of this legislation is "to quicken the public conscience and stimulate a sentiment in favor of law and order by making each citizen and taxpayer responsible for a proportionate share of the loss resulting from mob violence, thus making each a champion of peace and good order".

The manner in which these persons came together or the primary purpose for which they assemble is not material if they, in fact, become riotous after they are brought together. 1 Hawkins' Pleas of the Crown, c. 28, div. 4, §3, page 514 (Ed. 1824); Solomon v. City of Kingston, 31 N. Y. Sup. Ct. 562 (1881); City of Madisonville v. Bishop, 113 Ky. 106 (1902). Members of a charivari party who forcibly placed a bride and groom in a wagon and drew them through the city streets constituted a mob; the fact that the members of the party intended no serious harm to any one did not absolve the city from liability. Cherryvale v. Hawman, 80 Kan. 170 (1909). The authorities are not in accord as to whether the city's responsibility depends upon the size or formidable character of the mob. County of Allegheny v. Gibson, 90 Pa. 397 (1879); Adamson v. New York, 188 N. Y. 255 (1907).

TRUSTS—CONSTRUCTIVE TRUSTS—A son received land from his father by a deed absolute on its face, in consideration of his paying certain debts of his father, and upon a promise to reconvey the land on reimbursement for his advances. *Held:* The grantee was a constructive trustee of the land for the grantor. Vanderpool v. Vanderpool, 174 S. W. Rep. 727 (Ky. 1915).

Where land is conveyed by a deed absolute on its face, with a contemporaneous parol agreement to recovery upon repayment of indebtedness, the facts present the case of an absolute deed intended as a mortgage. The rule is generally accepted, both in England and in this country, that parol evidence is admissible in equity to show a deed to be in fact a mortgage. Whitfield v. Parfitt, 15 Jur. 852 (Eng. 1851); Alexander v. Grover, 190 Mass. 462 (1906). In some cases it seems to be required that there be fraud or accident in omitting the clause of defeasance. Lincoln v. Wright, 4 De G. & J. 16 (Eng. 1859), but the general rule now prevailing, in this country at least, is that the agreement of defeasance may be proved aside from any question of fraud or mistake. Miller v. Miller, 101 Md. 600 (1905); Cassem v. Heustis, 201 Ill. 208 (1903); Duell v. Leslie, 207 Mo. 658 (1907). Neither the "parol evidence rule" nor the Statute of Frauds is an objection in equity to the admissibility of such a parol agreement. Campbell v. Dearborn, 109 Mass. 130 (1871). The courts proceed upon the ground that the grantee becomes a constructive trustee of the land. Owen v. Williams, 130 N. C. 165 (1902); Giffen v. Taylor, 139 Ind. 573 (1894). But a contention that a deed absolute on its face was intended as a mortgage must be established by clear and satisfactory evidence. Rankin v. Rankin, 216 Ill. 132 (1905); Jones v. Rush, 156 Mo. 364 (1900). *Contra:* Donaldson v. Loan Co., 130 Ia. 467 (1906), where it was held that an agreement to reconvey land on payment of the grantor's indebtedness amounted to an express trust, which could not be proved by parol. In Pennsylvania, the Act of June 8, 1881, P. L. 84, provides that a deed absolute on its face shall not be reduced to a mortgage except by a defeasance in writing, signed, sealed and delivered at the time and recorded within sixty days. In Oklahoma, it is provided by Sessions Laws 1897, §12, ch. 8, that an absolute deed intended to be defeasible shall be recorded as a mortgage.

TRUSTS—OWNERSHIP OF PROCEEDS OF DRAFT—A draft attached to a bill of lading was delivered by a depositor to the Auburn bank in whose favor it was drawn and was sent by them to a correspondent bank for collection. The practice of the Auburn bank was to credit the depositor at once with the face value and permit him to draw on it, the depositor being charged with interest for the full amount until the returns were received, it being understood that if payment should be refused, the amount of the draft should be charged back to the depositor. When the deposit was made the depositor was indebted to the Auburn bank and subsequently overdrew the amount credited. A creditor of the depositor sought to reach the proceeds in the hands of the correspondent bank by garnishment. *Held:* The Auburn bank can claim proceeds as against the attaching creditor. Scott v. McIntyre Co., 144 Pac. Rep. 1002 (Kan. 1914).

It is generally held that on the deposit of paper endorsed "in blank" or "for deposit", where the amount is immediately credited to the depositor's account, in the absence of any contrary intention shown, title passes to the bank. Security Bank v. Northern Fuel Co., 58 Minn. 141 (1894); Morris v. First Nat. Bank, 201 Pa. 160 (1902); and this is so whether or not the custom of "charging back" unpaid drafts exists. Burton v. United States, 196 U. S. 283 (1904); Noble v. Doughten, 72 Kan. 336 (1905); although in a few jurisdictions the latter custom is deemed conclusive evidence of an agency. Armour Packing Co. v. Davis, 118 N. C. 548 (1896). The payment of interest on amounts drawn on account, Giles v. Perkins, 9 East, 12 (Eng. 1807), and *a fortiori* by payment of interest on full amount of credit given as in the principal case, being inconsistent with the vesting of title in the bank, is held to create an agency. St. Louis Ry. v. Johnston, 133 U. S. 566 (1889). In the principal case the court in its opinion says: "We regard the result as controlled by the circumstances that the depositor not only received credit for the amount of the draft, but actually drew from it and used the full amount," and further on, "Whether its [the depositary's] interest amounted to a full title or to a lien for what it had advanced is not material." So, while under the facts of the case the decision of the most difficult question in this class of cases, *viz.*, whether title has or has not passed to the depositary, was found unnecessary, under slightly altered circumstances it might well have become material. Under the cases cited *supra*, it is submitted, the payment of interest would indicate that no title passed but that the depositary merely acquired a lien on the draft which it held as collateral security for contingent future loans.

TRUSTS—REVOCATION—A grantor conveyed certain securities to a trust company in trust to pay the income to himself and wife for life, and after his death to pay the principal to those to whom he should direct by will, and if he should die intestate, to his heirs. He made a will naming the children of his brother. Subsequently by an instrument he directed payment to his wife. *Held:* The grantor could not change his disposition of the property without the consent of the children, since the creator of a trust, without reserved power of revocation, cannot change the terms of the trust without the consent of all the beneficiaries. N. J. Trust Co. v. Parker, 93 Atl. Rep. 196 (N. J. 1915).

It is well established that a completed trust without reservation of power of revocation can be revoked only by consent of all the *cestuis que trustent*. Watson v. Payne, 143 Mo. App. 721 (1910); Gobeille v. Allison, 76 Atl. Rep. 354 (R. I. 1910). If any of the *cestuis* are not in being, or are not *sui juris*, it cannot be revoked at all. Isham v. R. R. Co., 11 N. J. Eq. 227 (1856). When, however, it appears from all the circumstances that undue influence was exerted upon the settlor or that the omission of a power of revocation was due to fraud, accident or mistake, or that the settlement would be unreasonable or improvident for lack of a provision for revocation, equity will

set the settlement aside. Smith v. Boyd, 61 N. J. Eq. 175 (1900); Lawrence v. Lawrence, 181 Ill. 248 (1899). Further, the absence of a power to revoke a voluntary settlement or trust is viewed by courts of equity as a circumstance of suspicion, and very slight evidence of mistake on the part of the settlor will be laid hold of to set aside the deed. Garnsey v. Mundy, 24 N. J. Eq. 243 (1873). But when the settlor did not misapprehend the contents of the deed, and there was no fraud or undue influence, and no power of revocation was reserved, the settlor is bound, though some contingency was forgotten and unprovided for. Keyes v. Carleton, 141 Mass. 45 (1886).

In Pennsylvania it seems to have been held that a voluntary trust settlement which is testamentary in its nature is revocable by the settlor, although no power of revocation has been inserted in the settlement. Rich's Appeal, 105 Pa. 528 (1884); Chestnut St. Bank v. Ins. Co., 186 Pa. 333 (1898). But later decisions have restricted the apparent scope of these decisions, and it seems now to be law in Pennsylvania that power to revoke such a settlement will not be implied, and if the settlement itself is a valid trust, it is revocable only in accordance with its express terms. Kraft v. Neuffer, 202 Pa. 558 (1902); Fry v. Trust Co., 207 Pa. 640 (1904).